IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.349 OF 1989

Hanmant Mallappa Madgyal ..Appellant
(Orig. Defendant No.1)

Versus

Shantabai Dundappa (since deceased) by heirs : ..Respondents
(Nos.1 & 2 - Orig.Plffs. & No.3 Orig. Deft. No.2)

Ms.A.R.S.Baxi for the appellant
Mrs.S.S.Deshpande for the respondents

CORAM : P.V.KAKADE, J.

DATE : 23RD DECEMBER, 2004.

P.C.:

1. The appellant-orig.Defendant No.1 has preferred this appeal against the judgment and order passed by Additional District Judge, Sangli dated 23rd December, 1988 dismissing the Appeal and confirming the judgment and order passed by Civil Judge, Senior Division, Jat dated 11th August, 1982 partly decreeing the suit holding that Plaintiff No.1 and Defendant No.1 had 1/2

share each in properties described in Schedule "A" and "C" to the Plaint, however, it was held that the present Appellant as well as Plaintiff No.1 had no concerned with the property described in the Deed of Maintenance at Exh.61 on the record, as Plaintiff No.2 and Defendant No.2 were co-owners thereof.

2. The facts involved in appeal in brief are thus -

3. One Mallappa died more than 30/32 years ago leaving behind Sidgangavva as wife, who was Plaintiff No.2. Dundappa, Hanmanta are his two sons and Dundavva is daughter. Second son Hanmant is the Defendant No.1. Shantabai is the daughter of Dundappa, who is Plaintiff No.1. Dundappa died 10-11 years prior to the filing of the suit. Originally, Dundavva was not impleaded party but came to be added later on. A Genealogy has been given and Schedule of the property is appended to the Plaint. In Item "A" of the Schedule Survey Nos.34, 39, 40 and 41, Wastala Nos.2, 31 respectively situate at Village Sonwal, Tal. Jath, admeasuring 3 hectare 81 Ares, 3 Hectare 46 Ares, 5 Hectare 24 Ares, 3 Hectare 81 Ares respectively are shown. In Item "B" of the Schedule Grampanchayat House No.23 at Balbad and in Item

"C" of the Schedule House No.31 at Balbad are shown. There is also reference of Survey No.27, Wastala No.3, 28, Wastala No.2, 29, Wastala No.1, 35, Wastala No.1 admeasuring 3 hectare 95 Ares, 0.23 Are, 0.36 and 4 hectare 42 ares respectively added appearing to be included in the Maintenance Deed at Exh.61. Both the plaintiffs Shantabai, the grand-daughter of Mallappa and Sidgangavva wife of Mallappa filed the present suit claiming half share in the properties at Items A, B and C. It was alleged that it was the ancestral property coming from Mallappa and so the Plaintiffs together got half share and the defendant no.1 Hanmant got half share. In Suit No.73 of 1974 decree was passed when the present defendant No.2 was not a party. That suit was also adjudicated. Both the suits were heard together and were decided on 26th July 1979. The aggrieved parties in those suits had preferred an appeal and in Regular Civil Appeal No.198 of 1979 the suits were remanded for fresh decision with certain directions. These directions contained to include the properties referred in the maintenance deed at exh.61 and to implead Dundappa as the necessary party. According to these directions the defendant no.2 came to be added and the property shown in Exh.61 given in maintenance deed,

were included in the suit.

. The defendant no.1 admitted the relationship. According to him, Grampanchayat House no.23 was his self acquired property. Except this he has no objection to partition the property considering his share. He has added that Plaintiff No. 2 has no right of partition as she and Dundavva have been given the properties towards maintenance and in those properties also the defendant no.1 has got half share.

. The defendant no.2 has also filed her separate written statement contending that she was lame since birth. The properties described covering at Exh.61 were given to her for maintenance and the maintenance of Shantabai, her mother. Therefore, she claims half share in these lands along with the plaintiff No.2 and has stated that these lands could not be partitioned. The plaintiff No.2 and the defendant no.2 became exclusive owners of these properties. So far as other properties were concerned she had not challenged the suit.

. Pending the suit plaintiff no.1 Shantabai died. Her daughter Kallavva and husband Hanmant were brought

on record. Subsequently daughter Kallavva also died.

4. The learned trial judge adjudicated the dispute on merits and came to the conclusion that Plaintiff No.1 and Defendant No.1 had half share each in property in Schedule "A" and "C". Claim of Plaintiff No.2 was totally dismissed. The property mentioned in Schedule "B" was declared to be self acquired property of the defendant No.1. It was also held that the Plaintiff No.1 and the defendant No.1 had no concern with the property mentioned in Exh.61 and plaintiff no.2 and defendant no.2 are full owners thereof. Accordingly the decree was passed in this manner.

5. The aggrieved appellant-defendant no.1 preferred appeal to the District Court, Sangli. After hearing both sides the learned Addl. District Judge confirmed the order of the lower court and dismissed the appeal. Hence the present appeal.

6. I heard the learned counsel for both the parties. Perused the record.

7. It may be noted that even though the several

issues were sought to be raised as substantial questions of law at the time of admission of the appeal, the only question sought to be raised at the time of hearing is to the effect whether the respondent No.3 Dundavva gets right in the property given to her towards maintenance vide Exh.61 or not ? Ms. Baxi, the learned counsel for the appellant, vehemently urged that in view of provision of Section 15(2)(a) of Hindu Succession Act any property inherited by a female Hindu from her father or mother which devolved in the absence of any son or daughter of the deceased, not upon the other heir referred to in sub-section (1) in the order specified therein, but upon the heir of the father. Therefore, after the death of Shantabai and her daughter i.e. respondent No.1A, the property reverted back to the joint family of Mallappa and therefore, the present appellant would be entitled to his share in the said property and to that extent the lower appellate judge has erred in holding that the appellant has no right to take partition and his share from the said property. On the other hand Mrs. Deshpande, the learned counsel for the Respondents, submitted that the Plaintiff No.2 and the Defendant No.2 had become absolute owners of the said property, as they had pre-existing right of

maintenance in the properties being widow and daughter of Mallappa. The property given to them vide maintenance deed at Exh.61 is therefore their separate property and cannot be considered as only a life estate created in their favour.

8. In this regard it must be noted that the legal position is quite clear. It is to be noted that once the right has been surrendered and the properties were included in the hotchpotch of the other properties for the partition and separate possession, the right is automatically extinguished. The Respondent no.2 preferred Appeal No.226 of 1979 in which specific directions were given by the Court that the maintenance properties be included in the suit properties and after joining the Respondent No.3 as a party, the suit be decided. However, it seems that the Trial Court has not taken the said fact in to consideration, but the findings were given on the basis that the said properties are the self-acquired properties under Section 14(1) of the Hindu Succession Act. The right of Respondent Nos.2 and 3 specifically granted by way of arrangement for maintenance vide Exh.61 has come to an end in view of the findings in Civil Appeal No.226 of

1979 and amending the Plaint thereafter joining the Respondent No.3 as defendant No.2 and taking her part in the said proceedings by filing written statement and oral evidence proves that she also has accepted and surrendered her separate right in properties mentioned in Exh.61. Therefore, in my view, the findings given by the courts below on the said point are not correct.

. The Apex Court in the case of **Gulabrao Balwantrao Shinde vs. Chhabubai Balwantrao Shinde and Ors. - (2003) 1 SCC 212** has held that when the properties are ancestral properties, then the same cannot be given up by way of maintenance when the other co-parcener has birth right in such ancestral properties. The suit properties are the ancestral properties and there is no dispute about the same. Further, the appellant being the co-parcener, has birth right in the said properties. As can be seen from the record the Document at Exh.61 was created by way of an arrangement between the appellant and the Respondent Nos.2 and 3 during their life time and the same does become the absolute right of the respondent nos.2 and 3. Further, in view of the decision in Appeal No.226 of 1979 the respondent No.2 surrendered her share and

agreed to include the suit properties for partition and hence there should not be any question of declaration the same as absolute one. But on the contrary, taking the said properties into consideration, partition to be effected between the parties. In the present case, the respondent no.1 is the daughter of Dundappa, who died leaving behind Respondent no.1A, who also died during the pendency of the suit as three months' old child and thereafter Respondent no.1B was brought on record as heir of Respondent no.1A. It is to be noted that the suit was filed by Shantabai for seeking share in the property owned by her father i.e. Dundappa son of Mallappa Madgyal. Therefore, in view of the provisions of Section 15 sub-clause (2)(a) of the Hindu Succession Act, any property inherited by a female Hindu from her father or mother which devolved in the absence of any son or daughter of the deceased, not upon the other heir referred to in sub-section (1) in the order specified therein, but upon the heir of the father. Therefore, after the death of Shantabai and her daughter i.e. respondent no.1A, the property reverted back to the joint family of Mallappa. Hence, in view of this clear position of law, Respondent no.1B being the father of Kallavva and husband of Shantabai not entitled to any

share in the suit properties. This legal position is made clear by the Apex Court in the case of **V.Dadapani Chettiar vs. Balasubramanian Chettiar - (2003) 6 SCC 633**, therefore, in view of the said legal position applicable to the facts on hand, it is clear that the properties included in document at Exh.61 as well as properties in Suit No.73 of 1974 are required to be partitioned between the appellant and Respondent no.3 only, who are the heirs of Mallappa.

9. In the result the appeal is allowed and the judgment and decree passed by both the Court below to the extent of properties involved in document at Exh.61 stands quashed and set aside. The appeal stands disposed of with no order as to costs.

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